No. 12528.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant,

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually; LESTER COWAN, Doing Business as Lester Cowan Productions, and BULOVA WATCH COMPANY, INC.,

Appellees.

APPELLANT'S REPLY BRIEF.

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Although plaintiff does not agree with every statement of the law made by defendants, it is apparent that the basic differences between plaintiff and defendants do not involve legal principles but rather the applicability of those principles to the facts alleged in the complaint. This being so, we will not re-argue the several independent grounds for reversal presented in our Opening Brief.

This Reply Brief will therefore be confined to comment on certain errors in defendants' recitations of what they conceive the law to be, as well as their unwarranted assumptions and omissions to answer certain of our contentions.

ARGUMENT.

For the convenience of the Court and counsel we shall continue to use the same main subdivisions as were set up in our Opening Brief, numbers I, II, III, IV and VI, of which were commented on in the Brief of defendants Cowan, and number V of which was commented on in the Brief of defendant Bulova. Reference to our Opening Brief will be designated "O. B."; reference to defendants Cowan's Brief will be designated "C. B."; and reference to defendant Bulova's Brief will be designated "B. B." Emphasis throughout will be ours unless otherwise indicated.

I.

Inapplicability of Parole Evidence Rule.

Without attempting to recapitulate what has already been stated in our Opening Brief, we submit that defendants' position that the letter memorandum was intended to express the entire agreement and to stand alone without relation to extrinsic evidence or agreements is untenable. For example, the display to be furnished by The Gruen Watch Co., is not even described although the memorandum indicates that the nature of the display had been settled upon. Likewise, contrary to the position attributed to it by defendants (C. B. p. 8), plaintiff does not argue that the entire contract with the exception of one sentence was set forth in the memorandum. Quite to the contrary, plaintiff's position is that the memorandum is merely a memorandum, and that it was not intended to be a complete expression of every detail of the understanding of the parties. In our Opening Brief (pp. 12-14, 16-18) we have already pointed out many of the respects in which the letter memorandum was in fact incomplete and ambiguous, which details need not here be repeated.

The three decisions cited by defendants (C. B. p. 4) involved contracts which were clearly integrated and which not only purported to but did express all material items and terms. It should be noted, however, that the latest of those three decisions was determined in 1926 and that later cases have indicated that the rule applied therein was incorrect. See: *Universal Sales Corp. v. California Press Mfg. Co.* (1942), 20 Cal. 2d 751, 776, 128 P. 2d 665 (O. B. p. 20); *Wells v. Wells* (1946), 74 Cal. App. 2d 449, 456; see also California Code of Civil Procedure, Secs. 1860, 1856.

In other words, we believe the correct rule to be that the true meaning and intent of language may always be shown by reference to extrinsic evidence despite the fact that such language on its face may appear to be clear and complete.

In support of its contention that the instant document is integrated so as to exclude extrinsic evidence, defendants (C. B. p. 6) cite the Restatement of Contracts, Section 228, Illustration 2, which contains language of confirmation similar to the language of confirmation in the letter memorandum. However, that illustration assumes that the balance of B's letter is of such a nature as to constitute an integrated document. For example, if B merely wrote "confirming our oral arrangement this morning" and wrote nothing further there would obviously be no integrated contract. Indeed, the sales contract in the

California case of *Schmidt v. Cain,* 95 Cal. App. 378, 272 Pac. 803 (O. B. p. 16), began with very similar language but nevertheless parol evidence of an oral warranty was admitted, the court holding that the contents of the contract were such as not to prevent extrinsic evidence.

Moreover, contrary to defendants' assertions (C. B. p. 15) even if the memorandum was to be considered either a partially or entirely integrated agreement, nevertheless, an earlier or contemporaneous oral agreement may be admissible where it is not inconsistent with the integration.

This rule of admissibility with respect to prior or contemporaneous oral agreements is set forth in the Restatement of Contracts, as follows:

> "Section 240. *In What Cases Integration Does Not Affect Prior or Contemporaneous Agreements.*
>
> (1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and
>
> * * * * * * * *
>
> (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."

See: Illustrations 4, 5 and 6.

The latter illustration provides:

> "6. A and B orally agree that A shall work for B in specified employment and that B shall pay him therefor $3000. B delivers to A a written promise in terms absolute to pay $3000 in six months. The

oral agreement of A to do the specified work is operative both as a promise and as qualifying B's duty to pay $3000."

Defendants cite several cases (C. B. p. 8) for the proposition that a presumption exists that parties entering into a written agreement have expressed all the conditions by which they intended to be bound. But presumptions are a matter of evidence and only in a few cases (Code Civ. Proc., Sec. 1962) are conclusive; in the face of the allegations of the instant complaint any such presumption is of no more importance than would be the presumption that a written instrument is supported by consideration in the face of a pleading which alleged a lack of any consideration.

Defendants next assert (C. B. p. 9) that the agreements extrinsic to the letter memorandum are inconsistent with that document and they criticize the recent case of *Simmons v. California Institute of Technology*, 34 Cal. 2d 264, 274, 172 P. 2d 665, on the ground that it involved fraud. Nevertheless as was pointed out in our Opening Brief (O. B. pp. 14-15), that case expressly held that promises directed to the *form* of payment are not inconsistent or at variance with additional promises relating to the question of the *use* of such payments. So, in the case at bar, while a portion of the written memorandum provided which party would bear the cost of the display in the event it was or was not included, the memorandum is *absolutely silent as to what was to determine whether plaintiff's* display would or would not be included in the motion picture. Hence, the contemporaneous oral agreement as to the latter point was not at all inconsistent with the subject matter of the written memorandum but was supplementary thereto and should have been considered by the Court below.

Defendants' argument of inconsistency is for the most part premised upon a completely false assumption, to wit: that the memorandum *expressly granted to defendants* the right to determine whether the display was to be included in the picture or not. In fact this erroneous assumption is the corner-stone of defendants' entire case and a reading of defendants' brief will disclose that defendants assert over and over again the proposition that the parties contemplated "that *defendants might choose* not to use the display" (C. B. p. 1); "that *defendants might decide* to use the display" or "that *they might decide* not to use it" (C. B. p. 14); that *defendants* had an "absolute right of selection" (C. B. p. 20); that the agreement "expressly contemplates that *defendants may decide* not to use the sign in the picture" (C. B. p. 25); that defendants were to pay the cost of the display "if *they* do not include it" (C. B. p. 28); that *defendants* had "the privilege of determining" to omit the display (C. B. p. 34); that the written contract "*expressly* gives *defendants* the important choice" (C. B. p. 43); that *defendants* had the "privilege of omitting the display" (C. B. p. 44); and that the parties "had entered into a written contract giving *defendants* the absolute choice of omitting the display" (C. B. p. 47).

But the reiteration of such language in defendants' brief only serves to emphasize their weakness, *for no such language nor anything remotely like it can be found in the letter memorandum.*

Defendants likewise cite numerous authorities in support of the general proposition that the party required to perform one of two alternative acts has the right of selection. In this connection, defendants quote from *Blake v. Paramount Pictures,* 22 Fed. Supp. 249, and from *Arthur v. Baron De Hirsch Fund,* 121 Fed. 791 (C. B. pp. 10-14). The first of those cases involved a contract which *expressly* permitted the *defendant* to select one of two performances with respect to the furnishing of motion pictures, while the second involved a contract which *specifically* authorized the lender to name a grantee upon completion of each building and provided that the builder would lease the buildings if the lender did not name a grantee.

What defendants really seek to do is to imply from the cost provisions an absolute right of capricious election to use or not to use and then to assert that the extrinsic agreement with respect to use (except in the event of inability) is inconsistent with the *implied absolute choice.* But such implication is neither required nor proper where the parties have expressly agreed, even though extrinsically, as to the matter on which the written instrument is silent.

In the case at bar, the provisions with respect to the question of the display being "included" or "not actually included" were, under the circumstances of the case, really for the benefit of plaintiff. They were never intended by the parties to give the defendant any right of choice or election in the matter. If they had so intended, it would have been a simple matter to so provide, yet no such provision appears.

Another authority relied upon by defendants as establishing their claimed absolute right of election with which any other agreement is inconsistent, is Restatement of Contracts, Section 325, Comment c. (C. B. p. 10). However, in Comment b. of the same Section 325, the Restatement sets forth an example analogous to the instant case and indicates that where alternatives are of greatly varying value to the promisee the parties must have contemplated the alternative to the *contemplated performance* to apply only in the event of *inability* to perform the contemplated obligation. So, in the case at bar, it is self-evident that both parties contemplated and were interested in the *use* of the sign rather than its non-use. Certainly plaintiff was interested only in the advertising value to be obtained from such use and was not interested in merely receiving a portion of its expenses (the actual cost of constructing the sign) in connection with the project. On the other hand, it is equally self-evident that plaintiff would be willing to accept such partial return in the event of defendants' *inability* to use the sign.

Defendants' argument that the word "agreements" cannot refer to a promise by defendants to use the display (C. B. pp. 16-18) is likewise not well taken. Apparently defendants find some difficulty with the allegations of the complaint to the effect that the agreement between plaintiff and defendants was entered into through the instrumentality of the agent Kline. The simple fact of the matter is that the producer defendants requested Kline to obtain an agreement for them from plaintiff; that such agreement was obtained; and that the letter memorandum was written by Kline to producer defendants stating that such an agreement had been obtained.

Lastly, the defendants assert that there are no ambiguities in the letter memorandum. On this point we respectfully refer this Honorable Court to pages 16 through 21 of our Opening Brief, wherein we pointed out the many respects in which the letter memorandum was in fact ambiguous. However, it is interesting to note that although in an earlier portion of their brief, defendants argued that the memorandum was "a formal, composed and complete contract, with preambles, numbered paragraphing, and careful expression of the terms and conditions" (C. B. p. 8), nevertheless, in defending their position that the agreement contains no ambiguities, defendants are forced to the position that the entire paragraph 1 of the memorandum is merely "a recital or preamble to the agreement" (C. B. p. 18) and that paragraph 2 of the memorandum is also "merely a preamble." (C. B. p. 19.) We submit that the adoption of defendants' arguments would require this Honorable Court to disregard everything in the letter memorandum with the exception of a few words in paragraphs 3 and 4 of the memorandum, a method of construction which is diametrically opposed to the fundamental rule that effect must be given to all parts of an agreement.

II.

Producer Defendants Had Certain Implied Obligations.

In our Opening Brief (O. B. pp. 22-30) we pointed out that even if the parole agreement were not admissible, the memorandum contained an implied obligation that defendants would *use plaintiff's name if plaintiff's display were used.* The only answer which defendants make to this particular contention is that the provision that producers would bear the cost if the scene was "not actually included substantially in the manner presently represented," contemplated use without plaintiff's name. It is respectfully submitted that this language was inserted for the protection of plaintiff advertiser and (1) does not purport to permit substitution of a competitor's name on a display which is actually used *in the manner represented* and that (2) *since inserted for the protection of plaintiff this "alternative" cannot be taken advantage of by defendants in such a manner as to use the display, and then dub in another's name and offer to plaintiff the reimbursement contemplated only in the event of non-use of the display.*

Plaintiff likewise wishes to express disagreement with the "legal principle" asserted by defendants on pages 25 and 26 of their Brief, in support of which plaintiff cites *Delaware & Hudson Canal Company v. Pennsylvania Coal Company,* 19 L. Ed. 349, 8 Wall. 276 at 288. That case correctly states the rule with respect to implied obligations to be that the Court will not imply an obligation *"unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect, * * *"*

Defendants' error no doubt arose from having inadvertently taken the first of four examples of *situations* in which obligations have been implied and erroneously concluded therefrom that only in that situation will an obligation be implied.

Plaintiff agrees that courts are reluctant to enlarge a written contract by implication but we respectfully wish to point out that in the instant contract (assuming as defendants claim, that the extrinsic agreement must be barred) the fact remains that this Court must necessarily either (1) (as urged by defendants) imply a free choice by the producers to use or not to use *coupled with* an implied right to use plaintiff's display and substitute the name of another thereon, or (2) imply the obligation (as urged by plaintiff) to use plaintiff's sign except in the event of inability to use it or at the very least, an obligation to use plaintiff's name *if* plaintiff's sign were used; for certainly neither obligation (1) nor obligation (2) is expressly set forth in the letter memorandum.

On page 27 of defendants' brief it is asserted that the statement of consequences to follow in the event of failure to do a certain act prevents the implication that that party agreed to do that act. This may be a correct statement of a general rule but as is pointed out previously, it does not apply where the alternative performances are of such disproportionate value that it is fair to *imply* that the parties intended the *contemplated* performance unless through inability that performance be prevented. (Restatement of Contracts, Sec. 325, Illustration (b).) The general rule is also subject to the exception that where a clause is inserted manifestly for the benefit of one party it will not be interpreted to afford a choice to the party not intended to be benefited thereby. (See *Norfolk & N. B. Hosiery Co. v. Arnold,* 45 Atl. 608; *Leezer v. Fluhart,* 105 Wash. 618, 178 Pac. 817.)

Defendants attempt to distinguish (C. B. p. 31), on the ground that they did not involve alternative contracts, the cases relied upon by plaintiff which hold that a covenant of good faith will be implied in *all* agreements (O. B. pp. 22-30). Actually, however, one of the purposes of citing these authorities was to establish the fact that the letter memorandum *was not intended to provide alternative obligations* in any such manner as to permit defendants to induce plaintiff, a corporation not in the scene-making business, to construct a display and at the last minute to demand a large sum of money as a condition to retention of plaintiff's name thereon.

Defendants also attempt to distinguish the case of *Wood v. Lucy, Lady Duff-Gordon,* 222 N. Y. 88, 118 N. E. 214, on the same ground, namely that there existed no alternative performance in that case. *However, in the instant case unless defendants gave their best efforts to use plaintiff's display, plaintiff would receive no considera-*

tion, since the asserted "alternative" was merely the reimbursement of plaintiff for funds already expended by plaintiff in constructing the sign. If plaintiff were in the display making business then the distinction made on page 31 of defendants' brief might have some validity, but such is not the case here.

Defendants state (C. B. pp. 31-32) that *Norfolk & N. B. Hosiery Co. v. Arnold,* 45 Atl. 608, may have been presented by plaintiff in a misleading manner. However, a careful reading of that case will indicate that such was not the case. That decision illustrates a situation closely analogous to the instant case and the court implied an obligation to purchase in giving a reasonable interpretation to a clause which omitted an essential but, in the judgment of the court, a necessarily implied obligation.

We submit that no matter how defendants may attempt to torture the language of the letter memorandum or close their eyes to the obvious intent of the parties to the transaction here involved, the simple fact remains that the defendants herein have thus far successfully achieved a result which clearly was never contemplated or intended by the parties at the time they entered into the transaction. It is under just such circumstances that implied obligations should be and are given effect.

III.

The Conduct of Producer Defendants Subsequent to the Execution of the Letter Memorandum Was Such as to Bind Them to Use Plaintiff's Name on Its Sign and Display in the Motion Picture.

At the outset of their argument under Point III (C. B. p. 33) defendants quote the trial court's comment to the effect that the producers had complete freedom of action up to and including the final version of the picture. This conclusion (and defendants' argument) overlooks the fact that an election can be and very commonly is exercised well prior to the date of performance.

Defendants put a hypothetical case (C. B. p. 34) in which A and B execute a contract under the terms of which B agrees to give A, on July 1st, either a horse or a cow whichever he, B, may choose; prior to July 1st B tells A that he intends to give A the horse. Defendants conclude that B would not be bound under any theory of election, but we submit that defendants' conclusion is incorrect for there appears to be nothing preventing B from choosing prior to July 1st which alternative he will perform, and by exercising his right of choice he bars himself on the date of performance from giving other than that which he has chosen. Indeed defendants' hypothetical case is almost precisely illustrative of *Hankey v. Employers Casualty Co.,* 176 S. W. 2d 357, except that defendants in their hypothetical case gratuitously achieve a contrary result.

See also Restatement of Contracts, Section 325, Illustration 3:

> "3. A contracts with B in June to sell B 100 tons of sugar to be shipped to A from Cuba to New York during the following October. A further contracts to declare the name of vessel on which the sugar is shipped. A makes four shipments of sugar in October from Cuba to New York. While all the vessels are making the voyage, A declares the name of one of the vessels as that from which he elects to deliver sugar to B. A later makes a declaration of another vessel and refuses to deliver sugar from that vessel which he first named, but tenders sugar of proper amount and quality. A has committed a breach of contract."
>
> Restatement of Contracts, Sec. 325, Illustration 3.

In attempting to distinguish the *Hankey* case, defendants also cite the early case of *Norris v. Harris*, 15 Cal. 226, in which the Court stated, in passing, that the doctrine of election had no application to the case then before the Court. In that case, it was held that in the *absence* of any choice the obligation was nevertheless definite and certain to perform a certain act. But nothing in the case indicates that a choice or election would not have been given effect.

The defendants also attempt to analogize the asserted alternative contract to an offer (C. B. pp. 44-45) but obviously the rules applicable to the evidencing of election are quite different from the rules applicable to the acceptance of an original offer.

Defendants' argument (C. B. pp. 45-49) that the facts alleged are not sufficient to raise an estoppel presents primarily a question of fact and plaintiff has little to add except to refer the Court to the acts summarized on pages 37 and 38 of our brief. For some reason defendants have seized upon the doctrine of "promissory estoppel" as being the nature of the estoppel urged. Actually an estoppel to deny an election is either (1) an estoppel *in pais,* which is defined in Black's Law Dictionary (2d Ed.) as follows:

> "An estoppel by the conduct or admissions of the party; * * *. It lies at the foundation of morals, and is a cardinal point in the exposition of promises, that one shall be bound by the state of facts which he has induced another to act upon."

or (2) an estoppel by election, which is defined as follows:

> "An estoppel predicated on a voluntary and intelligent action or choice of one of several things which is inconsistent with another, the effect of the estoppel being to prevent the party so choosing from afterwards reversing his election or disputing the state of affairs or rights of others resulting from his original choice."

Note also that California Code of Civil Procedure, Section 1962(3) specifies as a *conclusive* presumption:

> "3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." (Code of Civ. Proc., Sec. 1962(3).)

We respectfully submit, therefore, that the facts set forth in plaintiff's complaint clearly gave rise to an election or to an estoppel to deny such election, or both.

IV.

The Use to Which Defendants Ultimately Put Plaintiff's Sign and Idea Was Unauthorized and Wrongful.

Our arguments on the foregoing contention were fully developed under point IV of our Opening Brief (O. B. pp. 39-45). Defendants have failed to meet these arguments.

Instead they are content to stand on the proposition that having tendered the bare cost of the display, they were free to make such use of it as they pleased (C. B. pp. 50-54). The difficulty with defendants' position is that *there is absolutely nothing in the letter memorandum which purports to give to producers any right either in the sign and display itself or to the common law property right in any idea or ideas embodied therein.* No matter what the letter memorandum might be, it is certain that it does not purport to be and is not a contract of sale; yet defendants' entire argument (under point IV) is necessarily based upon the assumption that a sale was involved.

A reading of the letter memorandum sufficiently establishes that it was not within the contemplation of the parties that the clock sequence utilizing Gruen's special display would be used *except with Gruen's name appended thereto.* The provision in the agreement referring to signs and displays "not actually included in the picture substantially in the manner presently represented to you" was manifestly inserted in order to protect plaintiff by limiting the conditions under which it would bear the cost of construction and cannot be twisted into a conversely implied authorization to defendants to take the specially designed display, and sell the same to the highest bidder merely by reimbursing the original designer-advertiser for its cost.

Defendants attempt to distinguish the *Liggett & Meyer Tobacco Company* case on the ground that that case involved a "novel" idea, whereas, according to defendants, the instant case does not involve a novel idea. Whether an idea is or is not a novel one would seem to be a question of fact for the trial court. Plaintiff submits, however, that there is considerably *more* novelty in the idea of a huge oversized neon illuminated clock from the pendulum of which a man swings during a chase than is found in the idea protected in the *Liggett & Meyer* case.

Defendants object (C. B. p. 54) that plaintiff nowhere specifically refers to "literary property" rights. However, the complaint sufficiently alleges in Paragraph VII that plaintiff expended a substantial amount of time, thought and effort to the conception and design of the special sign and display which was the original idea of plaintiff and was and is the property of the plaintiff.

We submit that the whole tenor of the letter memorandum and the only possible intention of the parties at the time of executing the same, was that if the displays submitted were used (regardless of defendants' duty to use or not to use) the consideration which the advertisers would receive was to be the *advertising value* of the appearance of their respective names in the picture. It was not contemplated, nor should the Court permit the producers to use the sign, display and sequence worked out by plaintiff and at the same time offer to reimburse plaintiff only for the mere out-of-pocket cost as if the display had not been used and included in the picture.

V.

Answer to Contentions of Defendant-Appellee Bulova.

Bulova tacitly concedes that it is liable if the producer defendants are liable.

In answer to our contention that *even if no cause of action were stated against producer defendants the complaint states a claim against defendant Bulova.* (O. B. pp. 46-52.) Bulova relies upon the case of *Sweeley v. Gordon* (1941), 47 Cal. App. 2d 385 (B. B. p. 3), which held that a complaint failed to state a cause of action for allegedly wrongfully inducing another to assert the invalidity of a contract which did not comply with the Statute of Frauds. Bulova concludes that there can be no liability for inducing another to do what he is legally entitled to do. We submit that that decision does not express what is now the law of California with respect to the factual situation here presented. Compare *Speegle v. Board of Fire Underwriters* (1947), 29 Cal. 2d 34, 172 P. 2d 867, in which the California Supreme Court points out that intentional and unjustifiable interference with contractual relations, even if a contract is at the will of the parties, is actionable in California. (O. B. pp. 47-8.)

The other District Court cases cited by Bulova, like the *Sweeley* case, are also contrary to the recent pronouncements of the California courts relied upon by plaintiff.

Bulova finally asserts that the complaint does not state a cause of action for unfair competition on any theory whatsoever. (B. B. pp. 4-8.) In support of this assertion the Restatement of Torts, Section 768, subsection 1, is cited, and it appears that Bulova attempts to avoid the allegations of the complaint by relying upon the privilege of competition. However, subdivision (a) of subsection 1 requires that "the relation concerns a matter involved in the competition between the actor and the competitor." The type of competition obviously contemplated by this section of the Restatement is *normal business competition* and it cannot be extended to afford a privilege to intentionally and unjustifiably deprive Gruen of the fruits of an advantageous relation with respect to an advertisement. In short, Gruen and Bulova are competitors in the watch business and not in the literary property, motion picture or advertising business.

Conclusion.

It is respectfully submitted that, construing the Complaint most favorable to the plaintiff and resolving all doubts in favor of its sufficiency, the Complaint in this action clearly states a claim against the defendants on one or more of the various theories heretofore set forth in our Opening Brief. Accordingly the judgment below and each and every part thereof should be reversed, and the cause remanded for further proceedings.

Respectfully submitted,

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